

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 19, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILLIP R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. 4:22-CV-05151-SAB

**ORDER REVERSING DECISION OF
COMMISSIONER**

Plaintiff brings this action seeking judicial review of the Commissioner of Social Security's final decision denying his application for social security benefits. Plaintiff is represented by Chad L. Hatfield. The Commissioner is represented by Heidi Triesch, Sarah Moum, and Brian M. Donovan. Pending before the Court are Plaintiff's Opening Brief, ECF No. 12, the Commissioner's Brief, ECF No. 16, and Plaintiff's Reply Brief, ECF No. 17.

After reviewing the administrative record, briefs filed by the parties, and applicable case law, the Court is fully informed. For the reasons set forth below, the Court reverses the Commissioner's decision.

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ORDER REVERSING DECISION OF COMMISSIONER ~ 1

I. Jurisdiction

On January 21, 2020, Plaintiff filed an application for Title II disability insurance benefits and an application for Title XVI application for supplemental security income, and with an onset date of May 1, 2019. Plaintiff's applications were denied initially and on reconsideration. Plaintiff requested a hearing. On December 8, 2021, a telephonic hearing was held. Plaintiff appeared and testified before an ALJ, with the assistance of his counsel, Chad Hatfield. K. Diane Kramer, Vocational Expert (VE) also participated. The ALJ found that Plaintiff was not disabled on December 28, 2021.

Plaintiff requested review by the Appeals Council, and the Appeals Council denied the request on September 30, 2022. The Appeals Council's denial of review makes the ALJ's decision the "final decision" of the Commissioner of Social Security, which this Court is permitted to review. 42 U.S.C. § 405(g), 1383(c)(1)(3). Plaintiff filed a timely appeal on November 30, 2022. ECF No. 1. The matter is before this Court pursuant to 42 U.S.C. § 405(g).

II. Five-Step Sequential Evaluation Process

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be under a disability only if their impairments are of such severity that the claimant is not only unable to do their previous work, but cannot, considering claimant's age, education, and work experiences, engage in any other substantial gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The Commissioner has established a five-step sequential evaluation process to determine whether a person is disabled in the statute. *See* 20 C.F.R. § 404.1520(a)(4)(i)–(v), 416.920(a)(4)(i)–(v).

1 **Step One:** Is the claimant engaged in substantial gainful activities? *Id.*
2 § 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work done for
3 pay and requires compensation above the statutory minimum. *Keyes v. Sullivan*,
4 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in substantial
5 activity, benefits are denied. *Id.* § 404.1520(b), 416.920(b). If the claimant is not,
6 the ALJ proceeds to step two.

7 **Step Two:** Does the claimant have a medically-severe impairment or
8 combination of impairments? *Id.* § 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A severe
9 impairment is one that lasted or must be expected to last for at least 12 months and
10 must be proven through objective medical evidence. *Id.* §§ 404.1509, 416.909. If
11 the claimant does not have a severe impairment or combination of impairments, the
12 disability claim is denied. *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
13 impairment is severe, the evaluation proceeds to the third step.

14 **Step Three:** Does the claimant's impairment meet or equal one of the listed
15 impairments acknowledged by the Commissioner to be so severe as to preclude
16 substantial gainful activity? *Id.* § 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the
17 impairment meets or equals one of the listed impairments, the claimant is
18 conclusively presumed to be disabled. *Id.* § 404.1520(d), 416.920(d). If the
19 impairment is not one conclusively presumed to be disabling, the evaluation
20 proceeds to the fourth step.

21 Before proceeding to the fourth step, the ALJ must first determine the
22 claimant's residual functional capacity (RFC). An individual's residual functional
23 capacity is their ability to do physical and mental work activities on a sustained
24 basis despite limitations from their impairments. *Id.* § 404.1545(a)(1),
25 416.945(a)(1). The RFC is relevant to both the fourth and fifth steps of the
26 analysis.

27 **Step Four:** Does the impairment prevent the claimant from performing work
28 they have performed in the past? *Id.* § 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the

1 claimant is able to perform their previous work, they are not disabled. *Id.*

2 § 404.1520(f), 416.920(f). If the claimant cannot perform this work, the evaluation
3 proceeds to the fifth and final step.

4 **Step Five:** Is the claimant able to perform other work in the national
5 economy in view of their age, education, and work experience? *Id.*

6 § 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the
7 claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*
8 *v. Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a claimant
9 establishes that a physical or mental impairment prevents him from engaging in her
10 previous occupation. *Id.* At step five, the burden shifts to the Commissioner to
11 show that the claimant can perform other substantial gainful activity. *Id.*

12 **III. Standard of Review**

13 The Commissioner's determination will be set aside only when the ALJ's
14 findings are based on legal error or are not supported by substantial evidence in the
15 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing
16 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"
18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
19 evidence is "such relevant evidence as a reasonable mind might accept as adequate
20 to support a conclusion." *Richardson*, 402 U.S. at 401.

21 A decision supported by substantial evidence will be set aside if the proper
22 legal standards were not applied in weighing the evidence and making the decision.
23 *Browner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
24 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the
25 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
26 1050, 1055 (9th Cir. 2006). The court must uphold the ALJ's denial of benefits if
27 the evidence is susceptible to more than one rational interpretation, one of which
28 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d

1 1190, 1193 (9th Cir. 2004). It “must consider the entire record as a whole,
2 weighing both the evidence that supports and the evidence that detracts from the
3 Commissioner’s conclusion, and may not affirm simply by isolating a specific
4 quantum of supporting evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.
5 2017) (quotation omitted). “If the evidence can support either outcome, the court
6 may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019.

7 **IV. Statement of Facts**

8 The facts have been presented in the administrative record, the ALJ’s
9 decision, and the briefs to this Court. Only the most relevant facts are summarized
10 here.

11 At the time of the alleged onset Plaintiff was 41. He is obese. In May 2019,
12 he became really depressed and thought about committing suicide. He went to
13 community health, and he was able to receive counseling. He experiences periods
14 of irritability, agitation, and has angry outbursts. He assaulted his daughter’s
15 boyfriend during one outburst. His medications cause him to become dizzy and
16 blackout. He also experiences swelling in his legs and shortness of breath. He
17 testified that when his legs swell, he must sit down and elevate his feet above his
18 heart for two hours. This can occur up to three times a day. He reports he can stand
19 for about 15 minutes before the swelling causes him to sit and elevate his legs. He
20 testified that he is limited to walking about 200 feet before he gets winded. He uses
21 a nebulizer, and he also uses an emergency inhaler when his breathing becomes
22 labored.

23 Plaintiff had been a heavy smoker, but at the time of his hearing, he was
24 down to a handful of cigarettes a day. He testified that he is scared to attempt any
25 type of full-time work because of the possibility of blacking out or hurting himself.

26 **V. The ALJ’s Findings**

27 The ALJ issued an opinion affirming denial of benefits. AR 15–27. At step
28 one, the ALJ found that Plaintiff has not engaged in substantial gainful activity

1 since May 1, 2019, the alleged onset date. AR 18.

2 At step two, the ALJ identified the following severe impairments: restrictive
3 lung disease, chronic bronchitis, sleep apnea, lumbar degenerative disc disease,
4 obesity (BMI 48-53), ADHD, mood disorder, anxiety disorder, binge eating
5 disorder. AR 18.

6 At step three, the ALJ found that Plaintiff did not have an impairment or
7 combination of impairments that meets or medically equals the severity of one of
8 the listed impairments. AR 21.

9 The ALJ concluded that Plaintiff has an RFC to perform:

10 a full range of light work as defined in 20 CFR 404.1567(b) and
11 416.967(b) except: he can stand and walk 4 hours total in combination
12 in an 8-hour workday; he cannot climb ladders, ropes, or scaffolds; he
13 can occasionally balance, stoop, kneel, crouch, crawl, and climb
14 ramps and stairs; he cannot have concentrated exposure to pulmonary
15 irritants or hazards (e.g., unprotected heights, moving mech parts); he
16 is limited to superficial contact with the public and coworkers, with no
17 more than occasional collaborative tasks; and he requires a routine,
18 predictable work environment with no more than occasional changes.

19 AR 20.

20 At step four, the ALJ found that Plaintiff was not capable of performing past
21 relevant work. AR 25.

22 At step five, the ALJ found there were other jobs that existed in significant
23 numbers in the national economy that Plaintiff could also perform in the national
24 economy, including representative positions such as small parts assembler, collator
25 operator, and an office helper. AR 26. Consequently, the ALJ found that Plaintiff
26 was not disabled.

27 **VI. Discussion**

28 **A. Step Two Analysis**

The ALJ erred in finding that Plaintiff's lower extremity edema was not a
severe impairment. An impairment or combination of impairments may be found

1 “not severe only if the evidence establishes a slight abnormality that has no more
2 than a minimal effect on an individual's ability to work.” *Webb v. Barnhart*, 433
3 F.3d 683, 686 (9th Cir. 2005) (citation omitted). The record amply demonstrates
4 that Plaintiff has chronic lower extremity edema and was required to elevate his
5 legs when resting. AR 561, 607, 609, 612, 617, 620, 637, 641, 707, 735, etc. The
6 ALJ failed to even discuss whether the edema was nonsevere. Instead, the ALJ
7 found that generally upon physical examination he had no edema. This is simply
8 not true. This error was not harmless as there is no indication that any limitations
9 caused by Plaintiff’s edema were considered by the ALJ in the sequential analysis.

10 **B. Evaluation of the Medical Opinions**

11 Plaintiff argues the ALJ erred by grossly mischaracterizing the treatment
12 record and rejecting the disabling opinions of treating physician Dr. Lakhani and
13 examining physician Dr. David-Boozer without properly considering their
14 supportability or consistency. The Court agrees.

15 In evaluating medical opinion evidence, the ALJ considers the
16 persuasiveness of each medical opinion and prior administrative medical finding
17 from medical sources. 20 C.F.R. § 416.920c(a), (b). The ALJ is required to
18 consider multiple factors, including supportability, consistency, the source’s
19 relationship with the claimant, any specialization of the source, and other factors
20 (such as the source’s familiarity with other evidence in the file or an understanding
21 of Social Security's disability program). *Id.* § 416.920c(c)(1)–(5). Supportability
22 and consistency of an opinion are the most important factors, and the ALJ must
23 articulate how they considered those factors in determining the persuasiveness of
24 each medical opinion or prior administrative medical finding. *Id.* § 416.920c(b)(2).
25 The ALJ may explain how they considered the other factors, but is not required to
26 do so, except in cases where two or more opinions are equally well-supported and
27 consistent with the record. *Id.*

28 Supportability and consistency are further explained in the regulations:

1 (1) *Supportability*.

2 The more relevant the objective medical evidence and supporting
3 explanations presented by a medical source are to support his or her medical
4 opinion(s) or prior administrative medical finding(s), the more persuasive
the medical opinions or prior administrative medical finding(s) will be.

5 (2) *Consistency*.

6 The more consistent a medical opinion(s) or prior administrative medical
7 finding(s) is with the evidence from other medical sources and nonmedical
sources in the claim, the more persuasive the medical opinion(s) or prior
administrative medical finding(s) will be.

8 *Id.* §§ 404.1520c(c); 416.920c(c).

9 **a. Dr. Lakhani**

10 Dr. Lakhani is Plaintiff's treating physician. Dr. Lakhani opined that
11 Plaintiff suffers from COPD, asthma, osteoarthritis, morbid obesity, right hip pain,
12 right knee pain, chronic shortness of breath, and lower extremity tenderness; (2) he
13 must lie down and elevate his legs throughout the day due to lower extremity
14 swelling; (3) his osteoarthritis is reasonably likely to cause pain; (4) he would miss
15 three days per month if he attempted to work a 40-hour per week schedule; (5) he
16 is limited to light work; and (6) he would be expected to be off task and
17 unproductive 12-20% of the time.

18 The ALJ found that Dr. Lakhani's opinions were only partially persuasive
19 because a checkbox form was used with minimal explanation and was poorly
20 supported. The ALJ found Dr. Lakhani's comment that Plaintiff would require
21 time during the day to lie down vague, meaningless, unpersuasive, and not
22 consistent with the record. The ALJ erred in its evaluation of Dr. Lakhani's
23 opinion. Dr. Lakhani treated Plaintiff. As early as March 2021, Dr. Lakhani noted
24 that Plaintiff experienced swelling in his lower legs. Thus, the need for Plaintiff to
25 lie down and elevate his feet due to lower extremity edema was well-documented
26 and not vague.

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1 **b. Dr. Davis-Boozer**

2 In January 2021, Dr. Davis-Boozer concluded that Plaintiff could stand/walk
3 a maximum of two hours and he would not be able to do any active job at all until
4 his conditions were well-treated. The ALJ found that Dr. David-Boozer's opinion
5 was an outlier. The ALJ believed Plaintiff's extreme shortness of breath was not
6 demonstrated in other exams.

7 The ALJ erred in evaluating Dr. Davis-Boozer's examination. Dr. Davis-
8 Boozer supported his opinion by evaluating Plaintiff and reviewing medical
9 records that reflect that Plaintiff suffers from shortness of breath. Dr. Davis-Boozer
10 noted that Plaintiff was "obviously short of breath throughout [the] entire exam,
11 even at rest, even after five minutes of rest;" that Plaintiff could not complete a full
12 sentence without stopping to take a breath and that Plaintiff was unable to lay
13 down flat more than 15 seconds. Dr. Davis-Boozer noted that Plaintiff had one plus
14 pitting edema. These observations support Dr. Davis-Boozer's opinion.

15 Also, the record reflects that Plaintiff's shortness of breath and swelling was
16 getting progressively worse. Dr. Davis-Boozer's evaluation reflect the worsening
17 of Plaintiff's symptoms. Rather than an outlier, Dr. Davis-Boozer's opinion is
18 supported by observations and a review of medical evidence. Dr. Davis-Boozer's
19 opinion is consistent with the record that reflects Plaintiff's worsening physical
20 condition. Dr. Davis-Boozer's opinion that Plaintiff is unable to meet the demands
21 of sedentary work due to acute shortness of breath, even when sitting/lying down
22 and on exertion is consistent and supported by the examination findings, and the
23 ALJ erred in finding it was not persuasive.

24 **C. Plaintiff's Subjective Complaints**

25 Plaintiff argues the ALJ erred in discounting his subjective symptoms of his
26 physical and mental health conditions.

27 In determining whether a claimant's testimony regarding subjective pain or
28 symptoms is credible, the ALJ engages in a two-step analysis. *Garrison*, 759 F.3d

1 at 1014. “First, the ALJ must determine whether the claimant has presented
2 objective medical evidence of an underlying impairment which could reasonably
3 be expected to produce the pain or other symptoms alleged.” *Id.* (citation and
4 quotation omitted). If the claimant satisfies the first step of the analysis, and there
5 is no evidence of malingering, the ALJ can reject the claimant’s testimony about
6 the severity of their symptoms “only by offering specific, clear and convincing
7 reasons for doing so.” *Id.* (citation and quotation omitted). “This is not an easy
8 requirement to meet: The clear and convincing standard is the most demanding
9 required in Social Security cases.” *Id.* (citation and quotation omitted). That said, if
10 the ALJ’s credibility finding is supported by substantial evidence in the record, the
11 Court may not engage in second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959
12 (9th Cir. 2002).

13 In assessing Plaintiff’s credibility, the ALJ made the following observations:
14 (1) Plaintiff engaged in minimal mental health treatment; (2) he continued smoke
15 cigarettes and marijuana; (3) he had health insurance; (4) engages in daily living
16 activities that are in tension with his symptom allegations, including taking care of
17 his children.

18 The ALJ’s observations are not true, and therefore cannot be clear and
19 convincing reasons for discounting Plaintiff’s testimony. A closer review of the
20 record reveals that Plaintiff did engage in weekly counseling sessions throughout
21 2019-20. Those sessions reflect that Plaintiff struggled with his anger and outbursts
22 toward family members. Plaintiff significantly reduced the number of cigarettes to
23 around three a day. At some point, Plaintiff lost health insurance and it affected his
24 care. As such, these are not clear and convincing reasons for finding that Plaintiff’s
25 statements regarding his limitations are not supported by the record.

26 The ALJ also failed to identify any activities that are inconsistent with
27 Plaintiff’s disabling testimony. There is not sufficient evidence in the record,
28 including the age and needs of the children, to find that caring for children is

1 inconsistent with his testimony, as the evidence suggests that his children are at
2 least school age.

3 **D. Lay Witness Testimony**

4 The ALJ considered Plaintiff's wife's functional report, which indicated that
5 she needed to help Plaintiff bathe, dress, and use the toilet because he cannot
6 adequately reach, and he gets out of breath. An ALJ is permitted to discount a lay
7 witness' testimony when it is substantially similar to the claimant's testimony and
8 the ALJ has properly discounted the claimant's testimony. *See Valentine v.*
9 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

10 The ALJ erred in failing to account for his wife's testimony. It was
11 consistent with Plaintiff's testimony as well as consistent with the longitudinal
12 record, especially when considering that Plaintiff's impairments were getting
13 increasingly worse.

14 **E. Obesity**

15 In November 2021, Dr. Lakhani indicated that Plaintiff's obesity
16 complicated critical activities of daily living, including difficulties using the
17 restroom on his own, and causing his arthritis in his back and knees to worsen. Dr.
18 David-Boozer identified that Plaintiff has some component of Obesity
19 Hypoventilation Syndrome. In May 2021, Dr. Cunanan noted that testing showed
20 restrictive lung disease which Dr. Cunanan suspected was due mainly to obesity.

21 The ALJ erred in failing to account for the difficulties caused and
22 exacerbated by his obesity in determining Plaintiff's RFC. Here, the record
23 indicates that Plaintiff's obesity exacerbated his impairments, and, more than
24 likely, is causing his impairments, including edema and shortness of breath.
25 Consequently, Plaintiff's edema, shortness of breath and obesity cause limitations
26 that are not accounted for in the RFC.

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VII. Conclusion

The ALJ erred in failing to properly weigh and consider the medical opinion evidence and Plaintiff's and Plaintiff's wife's testimony. The RFC failed to account for Plaintiff's edema and the need to elevate his legs during the day. It also failed to account for the fact that Plaintiff experiences shortness of breath upon exertion and even while sitting. As such, ALJ's RFC assessment does not account for the full extent of Plaintiff's functional limitation and cannot support the ALJ's disability determination. If the ALJ incorporated these limitations in Plaintiff's RFC, the ALJ would be required to find Plaintiff on remand. *See Harman v. Apfel*, 211 F.3d 1172, 1178–79 (9th Cir. 2000). Since it is clear from the record Plaintiff is unable to perform gainful employment and no additional proceedings are necessary, remand for an award of benefits is necessary. *See Benecke v. Barnhart*, 379 F.3d 587, 596 (9th Cir. 2004).

Accordingly, **IT IS HEREBY ORDERED:**

1. For docket purposes, Plaintiff's Opening Brief, ECF No. 12, and Reply Brief, ECF No. 17, are **GRANTED**.

2. For docket purposes, the Commissioner's Response Brief, ECF No. 16, is **DENIED**.

3. The decision of the Commissioner is **REVERSED** and **REMANDED** for an immediate award of benefits.

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1 4. Judgment shall be entered in favor of Plaintiff and against Defendant.

2 **IT IS SO ORDERED.** The District Court Executive is hereby directed to file
3 this Order, provide copies to counsel, and **close** the file.

4 **DATED** this 19th day of July 2023.



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10 Stanley A. Bastian
11 Chief United States District Judge
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